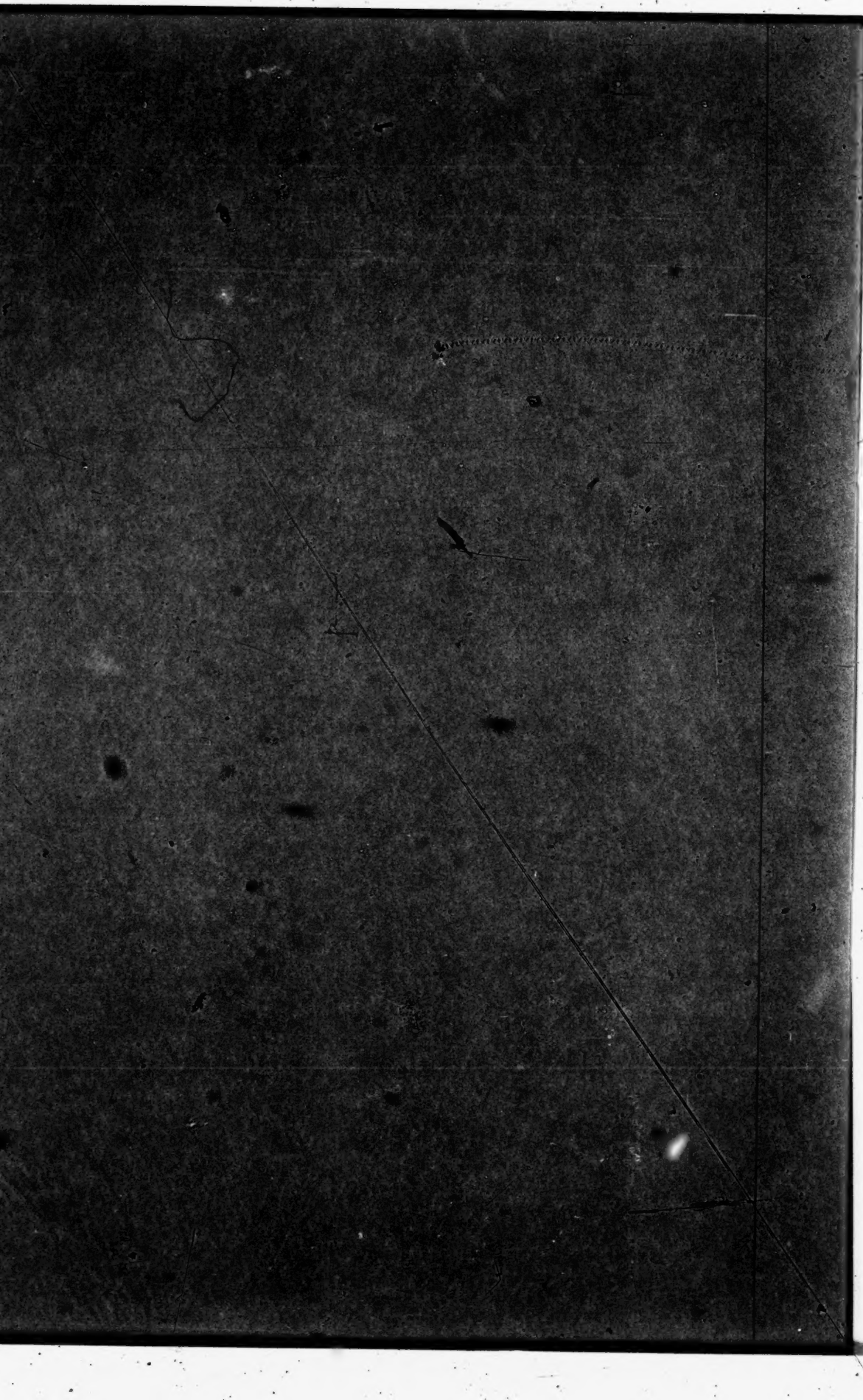

APPENDIX A.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF UNITED STATES DISTRICT COURT OF UTAH

Defendant's motion to dismiss came on for hearing the 8th day of May, 1969, before the Honorable Willis W. Ritter, Chief Judge. Plaintiff and third party defendants were represented by Brigham E. Roberts of the firm of Rawlings, Roberts & Black; the defendant was represented by Marvin J. Bertoch and Thomas A. Quinn of the firm of Ray, Quinney & Nebeker and by Sidney G. Baucom and Robert Gordon of the firm of Baucom, Gordon & Porter.

Depositions, affidavits and memoranda of law were presented and not excluded, and arguments were made by counsel. Having examined the depositions, affidavits and memoranda of law and listened to the arguments of counsel, the Court hereby makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The plaintiff owns a shopping center in Salt Lake County, State of Utah, with the exception of an area located within the center which is owned by Eldredge Furniture Company. The plaintiff constructed the buildings located in the shopping center and leases them to approximately seventy different tenants, and has sold one of the properties to the Eldredge Furniture Company.

2. Since 1961, defendant has supplied electrical power to the tenants and owners occupying the Cottonwood Mall Shopping Center.

3. Plaintiff in 1968 and 1969 installed a power plant on the premises, and by this lawsuit seeks to compete with the defendant in supplying electrical power for use in the shopping center.

4. Defendant, having expended approximately $558,000.00 in capital investment to supply the center with electricity, is equipped and able and desires to continue to provide all of the electrical power needed for present and future use in the shopping center.

5. The sole issue submitted to this Court by defendant's motion to dismiss, which the Court under Rule 12(b), Federal Rules of Civil Procedure, will treat as a motion for summary judgment, is whether or not the plaintiff has the right under Title 54, Utah Code Annotated, to compete with the defendant in the furnishing of electrical power in the Cottonwood Mall Shopping Center.

6. The Cottonwood Mall Shopping Center consists of approximately seventy stores and offices, which sell merchandise of various types and supply professional services to thousands of members of the general public. The stores include such large department stores as Z.C.M.I. and J. C. Penney Company, plus grocery stores, clothing stores, drug stores, restaurants and various other types of stores commonly found in a large shopping center. The premises include a large electrically lighted parking lot. In addition, numerous persons other than shoppers are attributed to and

use the facilities of the center for such activities as automobile shows, Junior Achievement fairs, garden and flower shows, boat shows, Go-Kart shows, stamp shows, Indian dancers, art and ceramic shows, bazaars, Halloween parades and other similar activities classified by the manager of the Cottonwood Mall Merchants Association as "traffic build ing events". Other activities are routinely allowed on the premises such as high school seminary dances, dances sponsored by the Latter-day Saints Church stakes, square dances, firemen's balls and Easter sunrise services, all of which are carried on when the stores are not open and are not considered by the manager of the Cottonwood Mall Merchants Association as "traffic building events".

7. If plaintiff were permitted to furnish electric power as it proposes to do, it would not be providing electric power "solely for its own use, or the use of its tenants" in contemplation of 54-2-1 (20), Utah Code Annotated, 1953.

Based on the foregoing Findings of Fact, the Court makes the following Conclusions of Law:

CONCLUSIONS OF LAW

1. 54-2-1(20), 54-2-1(29) and 54-4-25(1), Utah Code Annotated, 1953, are the controlling statutes. They read as follows: [The Court then quoted the statutes which are set forth in Appendix D].

2. The plaintiff, if permitted to generate and distribute electric power as it proposes to do, would be an "electric corporation" in contemplation of 54-2-1(20), Utah Code Annotated, 1953, and would be a "public utility" in contemplation of 54-2-1(29), Utah Code Annotated, 1953, and

could not legally construct an electrical plant or system or generate or distribute electricity without first acquiring a certificate of public convenience and necessity as required by 54-4-25(1), Utah Code Annotated, 1953.

3. Plaintiff has not been granted a certificate of public convenience and necessity and is not entitled under the law to be granted such a certificate for the generation or distribution of electricity to serve the Cottonwood Mall Shopping Center.

4. It was not the intention of the Utah Legislature in adopting 54-2-1(20), Utah Code Annotated, 1953, to allow persons to avoid the supervision and regulation of the Public Service Commission in connection with supplying electrical service to large shopping centers. It is a purpose of Utah law involving public utilities to protect users of electricity with respect to rates and quality of service. The legislature and the law intend that such protection be supplied to such users as those occupying the Cottonwood Mall Shopping Center.

5. The defendant is authorized by law to serve the users of electricity in the Cottonwood Mall Shopping Center and is entitled under the law to provide the exclusive electrical service to all users of electricity in the Cottonwood Mall Shopping Center, and accordingly is not in violation of any antitrust law and not illegally interfering with or violating any of plaintiff's rights in so doing.

6. Defendant is entitled to summary judgment against the plaintiff dismissing the plaintiff's complaint and for its costs incurred herein.

Dated this 11th day of July, 1969.

DECREE OF THE UNITED STATES DISTRICT COURT OF UTAH

Defendant's motion to dismiss came on for hearing on the 8th day of May, 1969, before the Honorable Willis W. Ritter, Chief Judge. Plaintiff and Third party defendants were represented by Brigham E. Roberts of the firm of Rawlings, Roberts & Black; the defendant was represented by Marvin J. Bertoch and Thomas A. Quinn of the firm of Ray, Quinney & Nebeker, and by Sidney G. Baucom and Robert Gordon.

Depositions, affidavits and memoranda of law were presented and not excluded, and arguments were made by counsel. Depositions and affidavits having been received, defendant's motion, in accordance with the provisions of Rule 12(b), Federal Rules of Civil Procedure, will be treated as a motion for summary judgment and disposed of under the provisions of Rule 56, Federal Rules of Civil Procedure.

The Court, having examined the depositions, affidavits and memoranda of law, and having listened to the arguments of counsel, and good cause appearing therefor,

And the Court expressly determines that there is no just reason for delay, and the Court expressly directs that this Decree be entered as a final decree pursuant to the terms and provisions of Rule 54(b), Federal Rules of Civil Procedure,

IT IS HEREBY ORDERED that defendant, Utah Power & Light Company, be, and is hereby granted sum-

mary judgment against plaintiff, the complaint of the plaintiff is hereby dismissed with prejudice and on its merits, costs to be paid by the plaintiff.

It appearing to the Court that through an oversight of the parties the Court did not make the determination of no just reason for delay and the direction that the decree be entered as a final decree and the parties and the Court intending that the decree should have such effect, IT IS FURTHER ORDERED that this Decree be entered as of the 11th day of July, 1969.

DATED this 23rd day of October, 1969.

APPENDIX B.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

March Term, 1971

COTTONWOOD MALL SHOPPING CENTER, INC., a Utah corporation, *Plaintiff and Appellants,* vs. UTAH POWER & LIGHT COMPANY, a Maine Corporation *Defendant and Appellee, et al.,*	Appeal from the United States District Court for the District of Utah No. 474-69

Before LEWIS, Chief Judge, BROWN, Chief Judge*, and SETH, Circuit Judge.

BROWN, Circuit Judge.

Through the wide door of a federal antitrust suit we back into an earth-bound, Utah-bound *Erie* problem of statutory construction since the thrusters on the alternative due process claim cannot orbit it to a constitutional apogee. In more austere terms the question is whether a shopping center operator in supplying electricity to the lessee merchants

* Of the Fifth Circuit, Sitting by Designation

becomes subject to regulation as a public utility. The Court below answered in the affirmative, and we affirm.

Cottonwood,[1] owner and operator of a large shopping center in the trade area of Salt Lake City sued Power Company[2] alleging that Power Company had attempted to monopolize the market for electrical power at the center and had interfered with existing contracts of Cottonwood to provide electricity for J. C. Penney, a tenant on the Mall. The basic question is put in issue by the defense that Cottonwood lacks the necessary Certificate of Public Convenience from the Utah Public Service Commission and therefore cannot challenge these economic activities of Power Company.[3] The Court below gave summary judgment to Power Company on the ground that Cottonwood would need a Certificate before it could press its claims, for if it had no right to sell electricity, then by definition Power Company could not interfere with this "right."

This brings into play the Utah statutory structure of utility regulation which starts with the traditional requirement of a Certificate of Public Convenience[4] for a broad

---

[1]Cottonwood Mall Shopping Center, Inc., a Utah corporation.

[2]Utah Power and Light Company, a Maine corporation, having franchises and requisite certificates to furnish electricity to the public.

[3]As an adjunct to this defense, Power Company sought and obtained a preliminary injunction to prevent Cottonwood from interfering with Power Company's business relationships with its customers on the Mall, one of whom was J. C. Penney Company.

[4]Utah Code Annotated § 54-4-25(1) (1969 Supp.) provides that:

> "No railroad corporation, street railroad corporation, aerial bucket tramway corporation, gas corporation, *electric corporation,* telephone corporation, telegraph corporation, heat corporation, automobile corporation, aircraft carrier (corporation), water corporation or sewage corporation shall henceforth establish, or begin construction or operation of a railroad, street railroad, aerial bucket tramway, line, route, plant or system or of any extension of such railroad, street railroad, aerial bucket tramway, line, route, plant or system, without having first obtained from the commission a certificate that present or future *public convenience and necessity does or will require such construction* * * *"
> (Emphasis added).

range of business including an "electrical corporation" which is broadly defined[5] as is "public utility"[6] generally. The decision turns on the exception whether Cottonwood distributes the electricity "(i) through private property alone, i.e., property not dedicated to public use, [ii] solely for his own use, or the use of his tenants * * *." And we zero in on factor [ii].

---

[5]In Utah Code Annotated § 54-2-1(20) (1969 Supp.) "electrical corporation" is defined:

> "Every corporation, *cooperative association* and person, their lessees, trustees and receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any electrical plant, or in anywise furnishing electric power, for public service *or to its consumers or members for domestic, commercial or industrial* use, within this state except where electricity is generated on or distributed by the producer through private property alone, *i.e., property not dedicated to public use,* solely for his own use, or the use of his tenants, *or by an association of unit owners formed under the "condominium ownership act," chapter 111, laws of Utah, 1963* [*57-8-1 to 57-8-35*] *and not for sale to others."*

The annotations to § 54-2-1 indicate the 1965 changes in this and other sections from their prior reading which we have indicated above by underscoring.

> History: L. 1917, ch. 47, art. 2, §1; C.L. 1917, § 4782; L. 1925, ch. 12, §1; R. S. 1933 & C. 1943, 76-2-1; L. 1948 (1st S. S.), ch. 7, §1; 1957, ch. 106, §1; 1959, ch. 94, §1; 1965, ch. 106, §1; 1969, ch. 153, §1.

Compiler's Notes.

The 1965 amendment inserted "co-operative association" after "corporation," "or to its consumers or members for domestic, commercial or industrial use" after "public service," "i.e., property not dedicated to public use" after "property alone" and "or by an association of unit owners formed under the 'condominium ownership act,' chapter 111, Laws of Utah, 1963" after "of his tenants" in subd. (20) and substituted "electrical corporation" for "electric corporation" after "gas corporation," inserted "or electrical corporation" after "gas corporation" and "or electricity" after "gas," and substituted "member" for "consumer" after "furnished to any" in the first and second sentences of the first paragraph and added the proviso at the end of the second paragraph of subd. (29), and made minor changes in punctuation.

[6]Section 54-2-1(29) provides:

"The term 'public utility' includes every * * * gas corporation, *electrical corporation* * * * where the service is performed for, or the commodity delivered to, the public generally, or in the case of a gas corporation or *electrical corporation* where the gas *or electricity* is sold or furnished to any *member* or consumers within the state of Utah for domestic, commercial or industrial use. And whenever any * * * gas corporation, *electrical corporation* * * * performs a service for or delivers a commodity to the public, or in the case of a gas corporation *or electrical corporation* selling or furnishing gas *or electricity* to any member or consumers within the state of

Cottonwood Mall is a large shopping center in the Salt Lake City trade area. The Center lies under one roof and contains a complex of stores and buildings surrounding a Mall. Cottonwood owns all of the property on the Mall as well as the parking area around the building except for the Eldridge Furniture building that Eldredge is buying from Cottonwood under a Utah Uniform Sales Agreement.[7] Except for the Eldredge building, all of the space in the Center is presently leased to about seventy tenants under written leases. The tenants share the expenses of lighting the parking lot and the exterior of the buildings, for painting the automobile parking stalls, for sweeping and cleaning the parking area, and for maintaining the green areas in the Center.

Utah, for domestic, commercial or industrial use, for which any compensation or payment whatsoever is received, such * * * gas corporation, *electrical corporation* * * * is hereby declared to be a public utility, subject to the jurisdiction and regulation of the commission and to the provisions of this title."

The underscoring indicates the changes in this statute from the original. See Note 5, *supra.* The Compiler's Notes state this as to gas:

> "The 1959 amendment inserted provisions concerning selling or furnishing gas to consumers for domestic, commercial, or industrial use in subds. (18) and (29)."

---

[7]Eldridge subleases part of its building to Morgan Jewelry Company and to Ex-Cel-Cis Beauty Salon.

The merchants of Cottonwood Mall have organized a non-profit corporation whose purpose it is to promote business on the Mall and to determine the extra-commercial promotional activities that should be conducted there. These activities will, in the jargon of the shopping center world, generate traffic to the Center with the hope, if not expectation, that many will then or later become customers of some or all of the merchants. The Board, consisting of persons elected by the merchants (who pay substantial dues based on square footage) and of the President of Cottonwood must approve any such outside activities on the Mall. In the past the Board has authorized a whole gamut of activities including automobile shows, small car races, sidewalk sales, garden shows, boat shows, stamp shows, Indian dances, a circus, art displays, and handicraft shows.[8] Also, the auditorium at the Center has been used by many religious, civic, social and political groups to hold gatherings, dances, and the like, a large number of which took place after store closing hours.

---

[8]Cottonwood's brief gives a more complete list:

"These promotions include auto shows; a small one ring traveling circus with one truckload of animals; a Gymkahana, consisting of small car races; sidewalk sales, moonlight sales, foreign car shows; Junior achievement programs; garden shows; outdoor living boat shows; Go-cart shows; stamp shows; Aztec Indian Dances; European Art Display; the Singing Christmas Tree; Halloween Parades; Snowmobile Shows; Ceramic Shows; Gladiola Shows; Handicraft Shows; Sports Car Shows; Home Entertainment Shows; Dolphin Shows; Outdoor living camper shows and Mobilhome Shows."

The controversy here arose when in 1968 — seven years after the contract was made with Power Company — Cottonwood decided to furnish electrical power to the tenants on the Mall as part of a total energy plan. It constructed an energy plant just to the south of the Center and has gone through some elaborate procedures to make the system workable. The plant,[9] as well as all ducts and wires from it to the Mall, are on contiguous private property owned by Cottonwood. Cottonwood has expended about one and one-half million dollars[10] to provide this capacity and intends to furnish the power only to itself and to the tenants of Cottonwood Mall, not to other elements of the general public."[11] The charges for the electrical power, heating and air conditioning will be included in the rental rates of the tenants.

We begin our analysis by recognizing that there are few if any Utah lampposts to light our *Erie* way. But as this

---

[9]Cottonwood's facilities meet the definition of "electric plant" in § 54-2-1(19).

"The term 'electric plant' includes all real estate and fixtures and personal property owned, controlled, operated or managed in connection with or to facilitate the production, generation, transmission, delivery or furnishing of electricity for light, heat or power, and all conduits, ducts or other devices, materials, apparatus or property for containing, holding or carrying conductors used or to be used for the transmission of electricity for light, heat or power."

[10]Power Company's investment in the Center runs from one-half to over one million dollars, and its annual loss of revenues will be about one-quarter of a million dollars were Cottonwood's plan to be activated.

[11]Cottonwood expressly states it would not serve the Eldridge building or its occupants. (See note 7, *supra.*)

is a case in which there is no specific "state law,"[12] we need not be dismayed since the Federal Court may look to all resources[13] including "the decisions of other states, federal decisions or the general weight of authority," the goal being "that the federal court reach the result that would probably be reached were the question to be litigated in a state court." 1 Barron and Holtzoff, *Federal Practice and Procedure,* § 8 at 40 (Wright ed. 1961).

The analysis begins with the long-age, but still pertinent, declaration of the Utah Supreme Court on the underlying policy of public utility regulation. In Gilmer v. Public Utilities Commission, 1926, 67 Utah 222, 247 P. 284, that Court pointed out that though competition was usually a desirable goal, the states had found the case to be otherwise in the public utility field. The states felt it more suitable to put these activities under closely controlled, state granted monopolies. This means that in construing these statutes — which of course expressly cover the physical operational ac-

---

[12]To paraphrase our decision in Manual of Omaha Ins. Co. v. Russell, 10 Cir., 1968, F.2d 339, *cert. denied,* 1969, 394 U.S. 973, 89 S.Ct. 1456, 22 L.Ed.2d 753: This "is deciding what [Utah] would decide on a question they have never decided. 402 F.2d at 343 and the appended note 13.

> "This is a little less difficult than the problem posed in Judge Friendly's celebrated Erie comment: 'Our principal task in this diversity of citizenship case, is to determine what the New York courts would think the California courts would think on an issue about which neither has thought.' Nolan v. Trans-ocean Air Lines, 2 Cir., 1960, 276 F.2d 280, 281, rev'd. 1961, 365 U.S. 293, 81 S.Ct. 555, 5 L.Ed.2d 571, on remand, 2 Cir., 290 F.2d 904."

See also Hopkins v. Lockheed Aircraft Corp., 5 Cir., 1968, 394 F.2d 656, 657; Martinez v. Rodriguez, 5 Cir., 1969, 410 F.2d 729, 731.

[13]See Stool v. J. C. Penney Co., 5 Cir., 1968, 404 F. 2d 562; Insurance Co. of North America v. English, 5 Cir., 1968, 395 F.2d 854; Stevens Industries, Inc. v. Maryland Casualty Co., 5 Cir., 1968, 391 F.2d 411, *cert. denied,* 1968, 392 U.S. 926, 88 S.Ct. 2285, 20 L.Ed.2d 1386.

tivities of Cottonwood — we must give a liberal reading to provisions subjecting the activity to regulation while simultaneously giving a more narrow scope to the exceptions.

Two factors lead us to the conclusion that Utah would hold Cottonwood to be subject to regulation and hence not within the sole use of tenants exception. The first is the historical development of the statutory structure. The second is the nature of the activities in which the beneficial use of the electric power goes way beyond that of the tenants alone.

Substantial changes have been made in the 1917 version[14] of § 54-2-1(20) as note 5, *supra* reflects. The key interpretation of this section of the statute is Garkane Power Company v. Public Service Commission, 1940, 98 Utah 466, 100 P.2d 571. Following the reasoning of Public Utilities Commission v. Nelson, 1925, 65 Utah 457, 238 P. 237, *Garkane* held that a public utility is a business that held itself out to serve the public generally and not one that limited its customers to a certain defined group.[15] The Court, considering whether the statute applied to electrical cooperatives that supplied electrical power to their own members only, held that the regulatory powers of the Public Service

---

[14]"The term 'electrical corporation' includes every corporation and person, their lessees, trustees and receivers or trustees appointed by any court whatsoever, owning, controlling, operating or managing any electric plant, or in anywise furnishing electric power, for public use within this state except where electricity is generated on or distributed by the producer through private property alone, solely for his own use or the use of his tenants and not for sale to others."

The 1917 statute was re-enacted several times prior to 1965. Somewhere down the line, "public *service*" was substituted for "*public use.*"

[15]Following *Garkane* closely is San Miguel Power Association v. Public Service Commission, 1956, 4 Utah 2d 252, 292 P.2d 511.

Commission did not apply to these cooperatives even though access to the cooperatives was open to almost anyone who applied and who paid a very nominal fee.

But in our *Erie* effort of divination this is of little help. First *Garkane* dealt with the "furnishing electrical power for public use" section of the 1917 version of § 54-2-1(20). See note 14, *supra.* Here the controversy hinges on the exception to the statute concerning distribution "solely for his own [the distributor's] use, or, the use of his tenants." Neither this part of § 54-2-1(20) nor its 1917 predecessor has ever been the subject of judicial interpretation in Utah.

Furthermore whatever light *Garkane* had cast on the legal concepts of "public" and "private" that underlie this whole area was doused by the 1956 revision (see note 5, *supra)* of the definition of "electrical corporation." First, the changes made specific reference to a "cooperative association." Next, and more signifiant, the restrictive notion of furnishing electric power "for public service" was greatly expanded. This was done by adopting for electricity what had been promulgated for gas in 1959 (see historical note in note 6, *supra)* to subject to regulation one "furnishing electrical power, * * * to its customers or members for domestic, commercial or industrial use * * *."

At least insofar as *Garkane* tried to define what "for public service" means, the 1965 statute seems clearly to overrule it. For *Garkane* expressly dealt with a company supplying electricity "to its customers or members."[16]

---

[16]The specific addition of condominiums as an exception adds weight to our conclusion. Quite apart from highly refined legalistic concepts in this modern tax-born structure, there is a considerable parallel in terms of interlocking mutual interests between condominium participants and the shopping center relationship.

But we think the legislature meant it to be more than a legislative repeal of *Garkane*. It brought gas and electricity in harmony and as reflective of a purposeful broadening of regulatory coverage, the changes were carried forward into the definition of "public utility." (See note 6, *supra*).

On the uncontradicted facts revealed by this record we think also that Utah would not consider the power furnished solely for the "use of [the] tenants." At the outset, like Mordecai at the gate, there is Eldredge and his brood of sublessees. True, Cottonwood disclaims a purpose to serve him. But Eldredge gets all the benefit from the common lighting of the interior Mall, the parking lot and all other areas not only open to the public but to which all hope and pray the public in droves will come. Eldredge customers, both real and prospective, likewise share in the cool, regulated atmosphere which Cottonwood power turns into an air-conditioned Mall. Eldridge is a direct "user" of the only beneficial function that power can supply to these premises — light and air conditioning in the public areas. Cottonwood cannot flee the statute because it in effect gives power away to Eldridge,, for the power is nonetheless "furnished."[17]

But we need not rest on this unusual fact alone. The whole activity of the merchants and operator of the Mall demonstrates that for the purposes of this utility statutory scheme, the power is not furnished "solely for the use of the tenants" (see note 5, *supra*). Not by accident, but by the sheerest deliberation, Cottonwood and the member-merchants have made others — members of the public singly or in organized groups — a principal object of the things which

---

[17]A *sale* is not required under § 54-2-1(20). Electricity need only be "furnished." (See note 5, *supra*). Under "public utility" coverage exists for electricity "sold or furnished." (See note 6, *supra*).

power supplies — light and air conditioning in the Mall and light in the parking areas. To be sure, all of this is not offered in the name of sweet charity. But at least to the extent that someone is attracted to the Center without ever making a purchase, or making a purchase from all of the contributory establishments, the beneficial enjoyment afforded is for the persons other than Cottonwood or tenants or both.

A utility structure is not based upon collateral legal concepts of property ownership. The law, as it adapts itself to the changing interests of an irrepressible society, can measure things in a realistic way. Thus, to the great delight of promoters, entrepreneurs, mortgage lenders, building contractors and merchants, the modern shopping center is a part of the community. It seeks to seek and serve the public. And the law at appropriate times recognizes its public characteristics, whatever may be the nature of legal title.[18]

With all of these factors — (i) legislative changes bringing in the concept of furnishing electricity to consumers (ii) the presence of Eldridge and (iii) widespread direct enjoyment by the public of the power furnished on a non-remunerative basis — we do not think Utah would permit this intrusion into the field of a public utility by one who

---

[18]See Amalgamated Food Employees' Union Local 590 v. Logan Valley Plaza, Inc., 1968, 391 U.S. 308, 88 S.Ct. 1601, 20 L.Ed.2d 603; Diamond v. Bland, Calif. Sup. Ct., 1970, ———Cal. Rptr., ———P.2d ———[39 U.S.L.W. 2342, December 16, 1970], reversing the opinion of the California Court of Appeal at 87 Cal. Rptr. 97, ———P.2d———. *Logan Valley* only addressed itself to speech activities that directly related to the business activities of the shopping center. The lower Court opinion in *Diamond* confirmed *Logan Valley* to its facts. The reversal by the California Supreme Court pointed out, however, that *Logan Valley* has possibly the far greater dimension that all speech activity permissible in a company town or a public park will be permissible in a large shopping center. We do not pass on any such issues, nor do we intimate any ultimate disposition of them, when or as any come before us later.

would be unregulated both from the standpoint of what it could do to its customers and, more so, the damage it could do to the public good by an uneconomic duplication of facilities and a raid on Power Company's customers to the detriment of all public power users. Nor do we think Utah would be persuaded by the cases from other states[19] which involve different statutes and much less precise policies.

Statutory escape failing, Cottonwood naturally turns to the Constitution to assert the statute violates the due process clause of the Fourteenth Amendment. Or in more classical constitutional terms, Cottonwood claims that the State cannot by legislation subject private economic activity to public regulation.[20]

But beginning with Munn v. Illinois, 1877, 94 U.S. 113, 24 L.Ed. 77, the Courts have moved in a direction of giving the legislature almost limitless power to regulate

---

[19]See, e.g., Drexelbrook Assoc. v. Pennsylvania Public Utility Comm'n., 1965, 418 Pa. 430, 212 A.2d 237; City of Sun Prairie v. Public Service Comm'n., 1967, 37 Wis. 2d 96, 154 N.W. 2d 360. These are for the most part apartment-tenant situations. They deal with the "service to the public" concept as in *Garkane* and not with the exception or the new broadened coverage of § 54-2-1(20) (see note 5, *supra*).

[20]Although not so presented here this can take a double form — (i) as Utah sees its own Constitution, the statute is an unwarranted invasion of private property, but (ii) if upheld by Utah it offends the federal constitution.

As to (i) we see no likelihood Utah would so hold. Although State v. Nelson, 1925, 65 Utah 457, 238 P. 237 got what some might regard as a resuscitating transfusion after the 1965 amendments (see notes 5, 6, *supra*) from Medic-Call, Inc., v. Public Service Commission, 1970, 24 Utah 2d 273, 470 P.2d 258, the narrow, limited activity there scrutinized bears no resemblance to the problem here. If it does anything it merely proves again the question-begging nature which as a "merry go round analysis," Home Insurance Co. v. Riddell, 5 Cir., 1958, 252 F.2d 1, really states the problem, not the solution. See also United States v. Stephen Brothers Line, 5 Cir., 1967, 384 F.2d 118.

Utah recognizes that a cooperative is a business "affected with a public interest," *Garkane, supra*, 100 P.2d at 574, and therefore subject to regulation under the 1965 changes.

private commercial activity. The handwriting on the wall is plain:

> "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with particular school of thought. See Nebbia v. New York, 291 U.S. 502, 78 L.Ed. 940, 54 S.Ct. 505, * * *, West Coast Hotel Co. v. Parrish 300 U.S. 379, 81 L.Ed. 703, 57 S.Ct. 578. * * *."

Williamson v. Lee Optical of Oklahoma, 1955, 348 U.S. 483, 488, 75 S.Ct. 461, ——, 99 L.Ed. 563, 572. *Nebbia* made it plain that it was the nature, and not the ownership, of the business that made it susceptible to state regulation. And to meet the due process requirement, the State must not face the heavy burden it does in First Amendment cases.

> "So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, * * *."

Nebbia, 291 U.S. at 537, 54 S.Ct. at ——, 78 L.Ed. at 957.

There is little doubt that Utah has borne this burden here. At this date we feel it unnecessary to explain why a restriction of competition in the utility industry is a "proper

legislative purpose." When we think of the overlapping power systems, duplicative operations, and higher consumer prices that would occur if every enterprise of this or of a related nature were not subject to state regulation, it is certain that for Utah the laws have a reasonable relationship to the end.

There it ends and so does Cottonwood's total energy plan.[21]

AFFIRMED.

---

[21] Power Company concedes the preliminary injunction evaporates with this affirmance so we do not reach this point.

APPENDIX C.

DOCKET ENTRIES OF UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

DATE	FILING — PROCEEDINGS
3/12/71	Opinion, Lewis, *Brown**, Seth (5th Circuit) Judgment: Affirmed.
3/24/71	Motion for ext. of time to 4/10/71 to file Petition for Rehearing — Orig. only — Cert. of Service
3/24/71	Time for filing petition for rehearing granted to 4/10/71 (HKP)
4/ 7/71	Appellants' motion for ext. of time to 4/25/71 to file petition for rehearing — Orig. and 3 cc. — Cert. of Service,
4/ 7/71	Order: Appellants *granted* to 4/25/71 to file petition for rehearing — Lewis.
4/22/71	Petition for Rehearing — Orig. and 3 cc. — Cert. of Service (4/23/71 — petition submitted to panel)
5/10/71	Order: Petition for rehearing denied. (Lewis, Brown, Seth).

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Upon consideration of petition of Appellants for Rehearing, it is ordered that said Petition be and is hereby denied.

DATED May 10, 1971.

APPENDIX D.

STATUTES WHICH THIS CASE INVOLVES

These section numbers relate to Utah Code Annotated 1953 1969 pocket supplement)

"54-4-25. *Certificate of convenience and necessity prerequisite to construction and operation — Certificates issued to electrical corporations brought under act — Air carriers.* — (1) No railroad corporation, street railroad corporation, aerial bucket tramway corporation, gas corporation, electric corporation, telephone corporation, telegraph corporation, heat corporation, automobile corporation, aircraft carrier (corporation), water corporation or sewage corporation shall hence forth establish, or begin construction or operation of a railroad, street, railroad, aerial bucket tramway, line, route, plant or system or of any extension of such railroad, street railroad, aerial bucket tramway, line, route, plant or system, without having first obtained from the commission a certificate that present or future public convenience and necessity does or will require such construction; . . . "

"54-2-1(20) The term 'electrical corporation' includes every corporation, cooperative association and person, their lessees, trustees and receivers or trustees appointed by the court whatsoever, owning, controlling, operating or managing any electric plant, or in anywise furnishing electric power, for public service or to its consumers or members for domestic, commercial or individual use, within this state ex-

cept where electricity is generated on or distributed by the producer through private property alone, i.e., property not dedicated to public use, solely for his own use, or the use of his tenants, or by an association of unit owners formed under the 'condominium ownership act,' chapter III, laws of Utah, 1963, [57-8-1 to 57-8-35] and not for sale to others."

"54-2-1(30) The term 'public utility' includes every common carrier, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewerage corporation, heat corporation and warehouseman where the service is performed for, or the commodity delivered to, the public generally, or in the case of a gas corporation or electrical corporation where the gas or electricity is sold or furnished to any member or consumers within the state of Utah for domestic, commercial or industrial use. And whenever any common carrier, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewerage corporation, heat corporation or warehouseman performs a service for or delivers a commodity to the public; or in the case of a gas corporation or electrical corporation selling or furnishing gas or electricity to any member or consumers within the state of Utah, for domestic, commercial or industrial use, for which any compensation or payment whatsoever is received, such common carrier, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, heat corporation, and warehouseman is hereby declared to be a public utility, subject to the jurisdiction and regulation of the commission and to the provisions of this title . . ."

APPENDIX E.

CONSTITUTIONAL PROVISIONS INVOLVED IN THIS CASE

UNITED STATES CONSTITUTION AMENDMENT XIV, SECTION 1.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF UTAH, ARTICLE I, SECTION 7 and 22.

Sec. 7. "No person shall be deprived of life, liberty or property, without due process of law."

Sec. 22. "Private property shall not be taken or damaged for public use without just compensation."